IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 748 OF 2003

IN

SUIT NO. 4259 OF 2001

Msgr. Nereus Rodriques & Ors. ..Plaintiffs

versus

Charlotte Irani & Ors. ..Defendants

Mr. J. F. Reis i/b. Y. M. Chaudhari for the Plaintiffs.

Mr. R. D'Mello for the Defendants.

CORAM : D. G. DESHPANDE,J.

DATE : 10TH DECEMBER,2004.

P.C. :

1. Heard counsel for the defendants who has taken out this notice of motion for setting aside the decree obtained by consent, also heard learned counsel for the plaintiffs.

2. The consent decree was obtained in this very suit No. 4259 of 2001. Copy of the consent terms is at page 65. The defendants agreed to vacate the premises, that is the sum and substance of the consent decree.

3. Counsel for the defendants arguing in support of the notice of motion contended that these consent terms were obtained by fraud and for that purpose he relied upon only one circumstance. According to him the plaintiffs had filed an affidavit Exhibit 2. In that affidavit in paragraph 7 (page No.63) plaintiffs had made a statement as under:

> "I say that books of account will clearly show that Provident Fund was being deposited in an Account of Defendant No.1 in Bank of India, Hill Road, Bandra being Saving Account No. 32688."

4. Counsel for the defendants contended that because of this statement of the plaintiffs on affidavit, they entered into the consent terms.

5. Firstly, there is no connection between this specific statement of the plaintiffs and the consent terms. There is no condition imposed upon the plaintiffs to pay the provident fund to the defendants nor any statement is made in the consent terms that the provident fund is deposited in the aforesaid account and the defendants will be

entitled to withdraw it. Act of giving possession agreed to by the defendants in the consent terms has no nexus with the said account.

6. Even though having heard the matter fully, it has to be decided whether there is any substance in the contention of the defendants. Counsel for the defendants drew my attention to the letter written by them to the Bank of India i.e. aforesaid branch, copy of which is enclosed with this notice of motion asking the bank to verify whether the aforesaid account No. 32688 was there in their branch. Reply (page 69) is to the following effect:

> "SB A/c. No.32688 does not exist with us. So we are unable to give statement of this a/c. to you."

The entire notice of motion for setting aside the decree on the ground of fraud is based on this statement of the bank.

7. As against this, my attention was invited by the counsel for the plaintiffs to their affidavit in reply and the letter which they received from the bank dated 9.6.2003. In this letter the bank wrote as under:

> "We note from your letter that there is a misconception in the term "Account does not exist". The Saving Bank Account 32688 existed in the Manual Operation. The Branch was computerised in the year 1985 and all operative accounts prior to this date have been logged in the system."

It is clear that the very foundation of the defendants in taking out this notice of motion, even though there is no connection at all between the aforesaid statement of the plaintiffs on oath and the consent terms goes away in view of the letter of the bank dated 9.6.2003. Therefore, there is no substance in this notice of motion, it has to be dismissed.

8. Counsel for the defendants however contended that it appears from the stand taken by the bank by their letter dated 9.6.2003 that the bank is in collusion with the plaintiffs in defeating the claim of the defendants. If that is the case, it is open to the defendants to file a regular suit joining the bank as party defendants. No relief can be granted in this notice of motion. Hence Notice of Motion disposed of.

9. Court Receiver to give possession to the

plaintiffs. Amount to be refunded back to the Plaintiffs.

10. After this order, counsel for the defendants prayed for staying operation of this order. Looking to the circumstances and total failure of the defendants to make out any case for setting aside the consent decree on the ground of fraud, prayer for stay is rejected.

11. All concerned parties to act on an ordinary copy of this order duly authenticated by the Court Associate.

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